

Kumara Pillai and Vaidielingam, JJ.

A.S. 520 of 1949 (M).

JUDGMENT

delivered by Kumara Pillai, J.

This appeal arises out of a suit for partition. Parties are Muhammaadans. There ~~are~~ two sisters named Pothumma Kutty Umma and Kathessasa Kutty Umma, and under Ex-A1 Karar dated 26-9-1896 executed by the heirs of Pothumma Kutty Umma and by her sister Kathessasa Kutty Umma and their brother Ammotti Haji, certain properties were allotted to Kathessasa Kutty Umma and the heirs of Pothumma Kutty Umma as tenants in common, the share of Kathessasa Kutty Umma in those properties being $1/8$. It is the property which Kathessasa Kutty Umma got under Ex-A1, that is now sought to be divided. Kathessasa Kutty Umma had one son named Abdul Kader and two daughters, one of whom predeceased without leaving any ~~male~~ issue.

Defendant 1 is Abdul Kader's son. After the deaths of Kathessasa Kutty Umma and Abdul Kader, defendant 1 and his mother, i.e., Abdul Kader's widow, jointly executed an assignment Ex-A13 in favour of the plaintiff on 3-5-1945 conveying to him the share which Abdul Kader had obtained in the plaintiff properties as one of the heirs of Kathessasa Kutty Umma.

On 20-4-1945, plaintiff also took another assignment Ex-A14 from defendant 4 who was one of the sons of Kathessasa Kutty Umma's daughter Beevi who had survived and who died subsequently. According to the plaintiff, Abdul Kader had $2/3$ rights in Kathessasa Kutty's properties and Beevi $1/3$ right. Defendant 4 had $1/6$ right in Beevi's share. Plaintiff brought the suit for partition of the shares he got under Ex-A13 and A14, his case being that he was entitled to $14/36$ of the plaintiff properties which are the entire properties which Kathessasa Kutty Umma and the children of Pothumma Kutty Umma got

got under Ex-A1. Plaintiff claims that he got 6/18 share in the plaint properties by virtue of Ex-A13 and 1/18 by virtue of Ex-A14. Kathcessa Kutty Umma's daughter Beevi had 5 children namely, defendants 2, 3, 4 and 5 and a daughter named Marian Kutty who is now dead and whose husband is defendant 6. Defendants 7, 8, 9, 10 and 11 are the children of Mariamkutty and defendant 6. Defendant 47 is the assignee from the husband of one Kunhi Ayissamma who was ^{the} a predeceased daughter of Kathcessakutty Umma already referred to.

In the lower court, defendants 2, 3, 4, 5, 6, 7 and 47 filed written statements, defendant 6's written statement being on his own behalf as well as on behalf of defendants 8, 9, 10 and 11 who were minors and whose guardian he was. The plaintiff's suit was brought on the basis that, in respect of separate properties, Kathcessa Kutty Umma was governed by the Muhammeden Law. This position was accepted by defendants 2, 3, 4, 5, 6 and 7 and they also claimed shares in the lower court in the plaint-properties on this basis. Defendant 47 contended that Kunhi Ayissa Umma was also entitled to a share in Kathcessa Kutty Umma's properties, that Kunhi Ayissa Umma's husband had obtained a share in Kunhi Ayissa Umma's share on her death and that he (the husband) ^{had} assigned his share to defendant 47.

The lower court found that defendant 47 had not proved the date of Kunhi Ayissamma's death and that ^{he had not} therefore established that her husband had taken any share in Kathcessa Kutty Umma's properties. Consequently, it refused to uphold the validity of the assignment taken by defendant 47. Although defendants 2, 3, 4, 5, 6 and 7 ^{have} conceded that in respect of the plaint properties, Kathcessa Kutty Umma was governed by Muhammeden Law, the lower court found that she was governed by the Marumakkathayam Law and therefore, it gave a decree to

to the plaintiff only for 1/18 of the plaint properties. Plaintiff has therefore, filed this appeal, his contention here being that Kathoessa Kutty Umma was governed by the Muhamadan Law and that he is entitled to 7/18 of the plaint-properties. Defendant 47 also has filed a memorandum of objection contending for the validity of the assignment taken by him from Kuthi Ayisa Umma's husband.

Defendants 8 and 10 attained majority after the appeal was filed; and after they attained majority, they engaged a separate counsel in this court and filed a petition here repudiating the written-statement filed by defendant 6 on their behalf and contending that Kathoessa Kutty Umma was governed by the Marumakkathayam Law and not by the Muhammadan Law.

If Kathoessa Kutty Umma was governed by the Marumakkathayam ~~Law~~ Law, defendants 8 and 10 would be entitled to ^{only} 2/9 of her properties. Defendants 2, 3, 4, 5 and 7 would, in that case, be entitled to 5/9 of the plaint-properties. It is significant that those persons, who were entitled to more than 1/2 share of the properties which belonged to Kathoessakutty Umma, had admitted in the lower court that Kathoessakutty Umma was governed by the Muhamadan Law and not by the Marumakkathayam Law. Defendants 4 and 7 still ~~stick~~ to that position in this court. Defendants 2, 3 and 5 ^{not} have/committed themselves to any definite decision in this court, but it has to be stated that their counsel Mr. Balakrishna Eredi stated at the time of hearing that he had received instructions from them to oppose the plaintiff's claim. Considering the unequivocal admission made by them in the lower court, we are inclined to think that their present attitude is a result of pressure brought to bear on them by defendants 8 and 10. Having regard to the admissions made by defendants 2, 3, 4, 5 and 7 in the lower court,

we are inclined to hold that Kathoosse Kutty Umma was governed really by the Muhammadan Law and not by the Marumakkathayam Law. But the ~~fact~~ fact remains that defendants 8 and 10 have now repudiated the written-statement filed by defendant 6 on their behalf in the lower court and that as they attained majority only after this appeal was filed, an opportunity ~~has~~ ^{to be} normally ~~been~~ given to them to substantiate their case that Kathoosse Kutty Umma was governed by the Marumakkathayam Law. Even if she was governed by the Marumakkathayam Law, defendants 8 and 10 would be entitled only to ~~the~~ 2/9 of her properties and the persons who are entitled to 5/9 had clearly admitted in the lower court that she was governed by ^{the} the Muhammadan Law. The persons who are entitled to the remaining 2/9 are defendants 9 and 11. Defendant 11 has not repudiated the written-statement that his father, in the lower court as his guardian ~~admitted~~ that Kathoosse Kutty Umma was governed by the Muhammadan Law. Defendant 9 attained majority during the course of the suit and she died only after the appeal was ~~filed~~ filed in this court. Till her death she too had not repudiated ~~the~~ the written-statement filed on her behalf by defendant 6 ~~admit~~ that Kathoosse Kutty Umma was governed by Muhammadan Law. In the circumstances, what ~~the~~ defendants 8 and 10 can urge ~~is that~~ they should be given their legitimate share in Kathoosse Kutty Umma's properties on the basis that she was governed by the Marumakkathayam Law.

Although the plaintiff's case that Kathoosse Kutty Umma was governed by the Muhammadan Law appears prima facie to be true, plaintiff's counsel stated that with a view to avoid delay and further complications, plaintiff was willing to surrender 2/9 share from the share that he has got under Exs-A13 and A14 to defendants 8 and 10. In view of this surrender by the plaintiff, we do not consider it necessary to give defendants 8 and 10 an opportunity to substantiate

their

their case that Kathoossekutty Umma was governed by the Muhammadan Law. Further, the case which defendants 8 and 10 have put forward, namely that their guardian, their father, had acted fraudulently in filing the written statement, is a contention which properly speaking, should be raised by way of a fresh suit.

So far as defendant 47's memorandum of objections is concerned, we are of the opinion that the lower court was right in refusing to uphold the validity of the assignment given by Kunhi Ayisamma's husband to him. Although the case of defendant 47 is that Kunhi Ayisamma had survived Kathoossekutty Umma and thereby obtained a share in Kathoossekutty Umma's property on her death, defendant 47 has adduced absolutely no evidence as regards the date of Kunhi Ayisamma's death.

The only other matter argued at the Bar was the claim made by the plaintiff in respect of mesne profits. The lower court has awarded to the plaintiff mesne profits only in respect of 1/18 share ~~is~~ given to him by the preliminary decree. Plaintiff's counsel urged that in view of our finding that Kathoossekutty Umma was governed by Muhammadan Law and in view of the admissions of defendants 2, 3, 4, 5 and 6 and 7, he was entitled to all the shares claimed by him in the plaint or at least to 5/18 in the plaint properties and that he was entitled to get a decree for mesne profits in respect of that share.

So far as the question of mesne profits is concerned, it has to be said that defendant 12, from whom the mesne profits are claimed, had a case in his written statement that he was not in possession of the plaint-properties or that he was not in sole possession of the plaint-properties and that the ~~heirs~~ ^{co-heirs} were given their legitimate share of the

means profits. The lower court has not discussed this contention or recorded any definite finding thereon. It is also to be said that neither defendant 12 nor his Legal Representatives have filed any objection to the decree given to the plaintiff for means profits in respect of 1/18 share. In the circumstances, with a view to avoid further ~~any~~ delay and future complications, we would restrict the award of means profits to the plaintiff to the 1/18 share allowed by the lower court and refusing means profits in respect of the larger share which we are now awarding to him.

For the reasons stated above, we set aside the preliminary decree passed by the lower court and pass a fresh preliminary decree in the suit as follows:

It is hereby declared that the plaintiff is entitled to 5/18 of the plaint properties, defendants 8 and 10 are entitled to 2/18, and defendants 2, 3, 5, 6, 7 and 11 are entitled to 2/18. The share namely, 2/18, to which defendants 2, 3, 5, 6, ~~and~~ 7 and 11 are entitled, will be allotted as a common allotment for all those defendants together; and the share namely, 2/18, to which defendants 8 and 10 are entitled will be allotted as common allotment to those two defendants. The lower court will pass a final decree in pursuance of this preliminary decree dividing the properties by metes and bounds after issuing a commission. Plaintiff is allowed to recover from defendant 12 and his estate means profits from date of Ex-A14 to this date ~~and~~ for the share which the lower court has allowed to him by the preliminary decree. Parties will bear their ~~own~~ respective costs.

We are not passing any decree for means profits after this day, as we are appointing hereby the Official Receiver functioning in the Tellicherry District Court, as Receiver

